United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

w/affidavit of service

74-1160

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P/S

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FOR THE SECOND CIRCUIT

DAIRYLEA COOPERATIVE, INC.,

Plaintiff-Appellant,

—against—

EARL L. BUTZ, Secretary of the Department of Agriculture of the United States,

Defendant-Appellee,

PENNMARVA DAIRYMEN'S COOPERATIVE FEDERATION, INC.,

Intervenor-Appellee.

APPELLANT'S REPLY BRIEF

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In the first section of this brief we shall answer appellees' arguments on the merits. In the second section we shall answer their jurisdictional and procedural points.

I

A. In order to avoid losing sight of the major issue in this case,* it is important to note just what the base-excess plan of Order 4 does to new (outside) producers who initially ship their milk into the Order 4 market during the short production season, August through December, which are the base forming months for the subsequent order year

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* Of the total volume of Dairylea milk involved in this case, only a very small portion was shifted in the months prior to October 1972. Of Dairylea's total loss of $262,500 only about $10,000 was incurred for the months prior to October 1972, and only $4,800 for May and June, 1972. (Exh. 4, JA 312).

NOTE: All emphasis in this brief is supplied unless otherwise indicated.

commencing March 1 following. In this short period when concededly milk is most needed by Order 4 and is most valuable, the new producers are nevertheless penalized by the arbitrary assigned bases and are only permitted 70% base milk instead of their true 90% base as allowed inside producers. This results in an average reduction of 10% in their returns as against those of the inside Order 4 producers. (Our main brief pp. 17-18). This is a very high entrance fee to exact of the new producers and one which they will never recover, contrary to the assertion at page 14 of Pennmarva's brief.* We pointed out at pp. 38-39 of our brief that neither the Secretary's decision nor the testimony either in the order promulgation hearing or at the trial gave any reason for penalizing shipments of milk by the outside producers into the order during the short season. No record references to the contrary have been furnished in the answering briefs.**

Everybody agrees that milk from new producers coming into Order 4 "would most logically be needed in this market during the short production months" (Secretary's Decision of May 18, 1970, 35 Fed. Reg. at 7937; Govt. Br. p. 14; Penn. Br. pp. 7, 10). And the Government's brief, page 25, states that "the first problem addressed by the Secretary was to encourage milk production during the short supply months".

Clearly the 10% reduction (resulting from the denial of a proper base) in the returns of the new producers shipping into the market in the short season can hardly be deemed "encouragement". It certainly does not provide those "spe-

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* Dr. Hand admitted flatly on cross-examination that Dairylea will never recover these losses (JA 295).

** In this connection we call the Court's attention to the alleged record references appearing at pp. 27-28 of the Government's brief, particularly in the second full paragraph on p. 27 and in the last sentence of the third full paragraph on p. 28.

cial incentives" for marketing in the fall when "nature is at an ebb" which the Government concedes in its brief, page 24, are necessary.

Neither the Government nor Pennmarva cites any testimony in the promulgation or trial record that gives any support to such a rank discrimination.

B. Both the Government and Pennmarva now assert that the Order 4 base plan was intended to be a seasonal base-excess plan. They concede, as they must, that the purpose of such a plan is to level production within the year by taking the peaks and valleys out of the normal spring-summer flush season as against fall-winter short season (Govt. Br. pp. 8, 24-26; Penn. Br. p. 10; see our brief p. 25).

It should be borne in mind that notwithstanding the "considerable discontent" on the part of producers resulting from the alleged abuses of the old base-excess plans* the old plans had succeeded in satisfactorily leveling flush and short season production and there was no need for any more stringent plan so far as the leveling of production was concerned (see our main brief p. 27). None of the challenged amendments relate in any way to further leveling of production.

C. The Government, however, urges (brief p. 31) that the challenged provisions were adopted in response to testimony at the promulgation hearing that there was:

> "concern over the problems caused by producers shifting from Order 2 to Order 4 on a temporary basis to

*These, as we have pointed out in our main brief, p. 45 (Secretary's Decision of May 18, 1970, 35 Fed. Reg. p. 7936), were largely corrected by other amendments to the base-excess plan.

take advantage of the higher base prices of Order 4 in the *spring* then returning to New York in the *fall* to obtain higher prices under its Louisville Plan.*

* * * * *

"The thrust then of all the proposals was to effectuate a pricing system that would encourage producers to coordinate their milk production with the seasonal needs of the Order 4 market, without attracting milk not regularly associated with the market to the Order 4 market during those seasons when production is flush and milk is in over-abundance. The proposal adopted by the Secretary was the 12 month Base-Excess Plan which discourages the latter practice by requiring a producer to have shipped milk to Order 4 during the months of shortage in order to be paid full base prices."

It is however much more than flush season entry which the provisions here challenged discourage. Essentially Dairylea entered Order 4 counterseasonally in the fall months of shortage, i.e., without any possibility of taking unfair advantage of Order 2 or 4 in the fashion complained of. (See our main brief pp. 10-11). Nevertheless, Dairylea's members and others similarly situated have been penalized. The abuse complained of was and could have been completely taken care of by penalizing outside producers for shipments during the flush months as the old base-excess plan did. It in no way justified penalizing shipments into the pool during the short months—which is what the challenged provisions do.

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* This is the crux of the case. The challenged provisions have exactly the opposite effect. They penalize new producers for staying in the Order 4 pool in the fall and certainly tend to limit their entry into the Order 4 pool in the fall.

D. For its part Pennmarva seeks to justify the arbitrary assigned base provisions of the order with an argument which is made wholly without citation to or support in the promulgation hearing record, the trial record or the Secretary's decision. Its argument upon examination completely belies its protestations that this is not a case involving "insiders" seeking to foreclose "outsiders" from "their" markets. This is clear from its argument which, while conceding that all milk is most valuable in the fall, seeks to distinguish the value of the fall milk of Dairylea's members from the value of the fall milk of the inside producers.

Pennmarva argues (Br. p. 31) without any citations to the record that the milk of an inside producer in the *current* fall season is more valuable because he was in Order 4 in the *prior* fall season—claiming that if the outside milk "was not regularly associated with the market it may not be needed in the market and it does not have the same value to the market as milk regularly associated".

This lets the cat out of the bag. Pennmarva is simply saying that the inside producers have a prior claim upon the market because of their old association with it, a consideration specifically outlawed by subsection (G) of the Marketing Act as we have shown in our main brief at pages 16-19.

Pennmarva's brief also makes it clear that in its view the base plan under Order 4 is one that is concerned with the total *annual* amount of milk associated with the pool rather than the seasonality of its production. Thus Pennmarva expressly states at page 13 of its brief that "it is desirable to have the proper volume of milk associated with the market on an *annual* basis".

Even the Government's brief concedes at page 35, quoting from Marketing Research Report No. 957, that if a

plan's "concern centers on *annual** level of milk deliveries rather than on seasonality of production within the year" it is what the Government calls a "Class I base plan"—meaning that it is required to comply with adjustment (f) rather than with adjustment (d). See also in this connection our main brief page 24 *et seq.*

Both the Government and Pennmarva argue at length that the provisions challenged are proper irrespective of subsections (D) and (G) because they label them a base-excess plan. This type of argument has often been overruled under the Marketing Act. Merely labeling a provision as one of the authorized adjustments does not justify it. *Zuber* v. *Allen,* 396 U.S. 168, 180 (1969). It is necessary to show a reasonable relationship to the authorized adjustment, not inconsistent with subsections (D) and (G) which we have shown in our main brief at pp. 29-33 are overmastering. For instance, a base-excess plan which denied bases to producers situated more than 100 miles from Philadelphia would be manifestly illegal as would a plan which denied bases to any producer not delivering to the market at the date of the promulgation of the order. Here the denial of bases to new producers shipping milk to the market in the short season bears no rational relationship, as we have shown, to the proper purposes of a base-excess plan.

E. Both the Government and Pennmarva inferentially concede that the provisions of the base-excess plan which penalize new producers for a period of a minimum of 5 months to a maximum of 16 months cannot be justified under subsection (D) of the Marketing Act (see Govt. Br. p. 35; Penn. Br. pp. 19-20). They argue, however, that the Secretary had authority to impose these limitations by restrictive provisions in a base-excess plan in order to

* Emphasis in the original.

prevent Order 2 producers from entering the Order 4 market in the flush and shifting back to the Order 2 market in the short season.

However, the shifting in and out of an order market by producers is just another instance of an old problem which has confronted marketing orders since their inception—that is, outside producers sporadically shipping into a regulated market when it is favorable and leaving it when it is unfavorable.

Congress addressed itself to this problem specifically in subsection (D) and expressly stated that the *exclusive and only* available remedy for this problem is under subsection (D) which limits the penalty which may be imposed on newly entering producers to a period not exceeding three months. This overriding requirement cannot be avoided by manipulation of a base-excess plan. (See our main brief pp. 40-41).

In point of fact Subsection (D) would permit the type of predecessor base-excess plan in effect in the Washington, D.C. market (which was merged with Order 4) where the base payout period was limited to the three months of April, May and June (See Secretary's Decision of May 18, 1970, at 7936) and which as we have pointed out (p. 3 above) achieved satisfactory leveling of production.

F. The Government's attempted differentiation (brief pp. 34-35) between the type of base plans authorized by adjustment (d) and the type of base plans authorized by adjustment (f) finds no support in the statutory language. Neither adjustment (d) nor adjustment (f) uses the term "Class I base plan" or "base-excess plan". These terms as used in Marketing Research Report No. 957 quoted by the Government's brief (p. 35) were defined therein for the purpose of that study which covered not only federal but state and cooperative base plans as well. It is there said

at page 3 that "to cover this broad spectrum [of milk supply management plans currently in existence] in one study, it was necessary but difficult to arrive at a comprehensible set of terms or definitions" and accordingly "a glossary of these terms [as used in the study] is included in the appendix." The terms are neither statutory nor relevant to the issues here. We have in our main brief at pp. 25-26 pointed out the real differences in the statutory language and requirements.

At page 35 of its brief the Government argues that because the Order 4 base-excess plan provides for new bases every year it falls under adjustment (d) and indicates that the plan would fall under adjustment (f) only if it created bases which carried over from year to year. This is quite the opposite of what the statutory language provides. Under adjustment (d) the statute provides that bases may be fixed on the basis of "marketings of milk during a representative period of time, which need not be limited to one year". On the other hand, under adjustment (f) the statute provides that bases may be fixed on the basis of "marketings of milk * * * during a representative period of one to three years, which will be automatically updated each year". Thus it is adjustment (f) plans which are required to be updated each year, not adjustment (d) plans. The real difference, as we pointed out in our main brief p. 26, is that if the plan relates the adjustments to bringing supply into line with class utilizations it is authorized only under adjustment (f).

In spite of all the protestations of the appellees the varying monthly bases accorded new producers by the order—60% in January, July and December, 50% in March through June, and 70% in August through November—can only be explained as Dr. Hand sought to do in the promulgation hearing record by relating them to the Class I utilizations in the market. (See our main brief page 28).

G. The Government argues at page 38 of its brief that the part of the Marketing Act involved in *Vaughn-Griffin Packing Co.* v. *Freeman,* discussed in our main brief at pages 33-35, is different in wording from adjustment (d). The same argument appears in Pennmarva's brief at page 28. Both suggest that the statutory provision in *Vaughn* required a "uniform rule" while adjustment (d) uses the term "equitable apportionment". What conclusion they would derive from this is unstated. In any event, the statutory provision in *Vaughn,* quoted in our main brief at page 34, in express terms refers to a uniform rule "to the end that the total quantity of [a commodity] * * * marketed * * * shall be *equitably apportioned* * * *"— which is substantially identical with the language of adjustment (d).

H. Pennmarva's expert witness at the trial confused the issues herein by suggesting that the provisions challenged are nothing more than what he dubbed "performance standards" such as are contained in other orders. Appellees press this testimony on this Court (Penn. Br. p. 13; Govt. Br. p. 28).

The fact is that all orders, including Order 4, contain pooling standards (which the witness also dubbed "performance standards") for *plants.* These standards provide the test by which it is determined whether a plant, and in consequence the producers delivering to it, does or does not qualify as a pool plant under the order. In point of fact, both the Dairylea Honesdale plant and the Johanna Farms Flemington plant in question met these pooling standards at all relevant times. Nevertheless the producers delivering to these plants are being discriminated against by the base-excess provisions which are in effect superimposed *on producers.*

The imposition of such requirements on producers clearly violates the spirit of Section 608c(13)(B) of the Marketing Act which provides that "no order issued under this chapter shall be applicable to any producer in his capacity as a producer".

I. The Government argues at brief page 29 that a weakness in Dairylea's case on damages is the fact that its producers were in fact paid the Order 2 blend price for their milk no matter where it was marketed. This is without merit. Dairylea is a reblending cooperative which blends the returns of all its members in its own intra-cooperative pool and pays its members out of the resulting blend, subject to miscellaneous differentials. This is expressly permitted by the Marketing Act, Section 608c (5)(F) (Exh. 1, pars. 4-5; JA 302). Dairylea is a fully qualified Capper-Volstead cooperative (*Id.* paragraph 3). As such it has the right to pool the milk of all of its members regardless of the different marketing orders served. This does not eliminate the loss suffered by its members. It simply spreads it over its entire membership. This in no way relieves the pool of liability for the full amount of the damage caused by the illegal provisions. Dairylea's Order 4 producers did not receive compensation from the Order 4 pool, they received it from Dairylea's reblended cooperative pool at the expense of Dairylea's other members.

Pools, as the Court noted in the *Rock Royal* case, 307 U.S. 533 at 573 (1939), are merely "common funds for equalizing risks". They are a form of co-insurance whereby each of the members to a certain extent indemnifies the other members against the risks inherent in marketing in any one single market but they do not in any way detract from the liability of the wrongdoer (here the pool) for the full damage. See *Hartnett* v. *Reiss Steamship Co.*,

421 F.2d 1011 (C.A.2, 1970). See also 25 C.J.S. *Damages,* pp. 1011-20; *Restatement of Torts,* Comment e to §920 at pp. 620-21.

What Dairylea's Order 4 members choose to do with the funds they are legally entitled to receive from the Order 4 pool is no concern of the Order 4 pool. It concerns Dairylea's other members.

J. Pennmarva seems to suggest at page 3 of its brief, that the arguments that we are making to this Court were not made below. If this is what it implies, it is untrue. The fact is that all the arguments which we are making to this Court were extensively briefed and argued by Dairylea below (*cf.* JA 300).

II

The Jurisdictional Issue

The Court below correctly held that it had jurisdiction of this case.

The Government, in the Court below, argued the "exhaustion" question in a confused and confusing fashion. It continues to do so before this Court. The Government's argument begins with the statement that Dairylea is a handler; it then cites Section 608c(15)(A) of the Marketing Act as creating an administrative forum for "handlers"; then in a passing reference it concedes that handlers seeking to litigate "producer issues"—the type of issue before this Court—in 15A proceedings were held to have no standing to do so, but goes on to suggest that the Secretary has now altered his position and concludes that Dairylea should therefore have been relegated to a 15A remedy before going to Court.

A. The plain fact is, as we shall show, that whether or not Dairylea was a handler as to some or all of the milk here involved, it nevertheless had no administrative 15A remedy available as to the issues before this Court.

A cooperative association has two separate and distinct capacities: one is as a handler subject in general to the same obligations as a proprietary handler—in this capacity having the duty to make payment *into* the pool at the full value of the milk it handles *at the class prices;* the *other* capacity, is as a representative of its producer members entitled to receive *from the pool* the uniform or blend prices due its producer members. And it is, and from the beginning has been, the established policy of the Department of Agriculture consistently maintained and consistently upheld by its Judicial Officer that a cooperative association *in its capacity as a handler* cannot maintain a 15A proceeding where the question involved concerns *its rights as a producer representative.* This position it should be noted was clearly charted for the Department by the decisions of the Supreme Court in a series of decisions under the Marketing Act.

The two distinct capacities of cooperative associations are separately set forth in separate subsections of Section 608c(5) of the Marketing Act. The first is subsection (A) which provides for a marketing order's:

> "(A) Classifying milk in accordance with the form in which or the purpose for which it is used, and * * * providing a method for fixing, minimum prices for each such use classification *which all handlers* [including cooperative handlers] *shall pay* * * * for milk purchased from producers or associations of producers. Such prices shall be uniform as to all handlers, subject only to * * * [three stated] adjustments * * *."

This is the provision which relates to the cooperative's capacity as a *handler.*

The provision which relates to the other capacity of the cooperative, that is its capacity as a *producer representative,* is set forth in subsection (B) authorizing provisions in an order which provide:

> "(ii) for the payment *to all producers and associations of producers* delivering milk to all handlers of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered."

Reference to the full text of subsections (A) and (B) will show that the prices to be paid under subsection (A) (the class prices payable into the pool by handlers) are not subject to seasonal (base-excess) adjustments whereas the prices established by subsection (B) (blend prices payable by the pool to producers) may be subjected to such an adjustment—so that this case involves solely a producer issue.

Of course a cooperative can under certain circumstances be a handler, e.g., it may itself bottle and sell milk; or as in the case of Honesdale milk, it may operate a supply plant. To the extent that it is a handler, the cooperative has handler obligations to the Producer Settlement Fund (the pool) to pay class prices. But the cooperative also at the same time and in respect of the same milk stands in the shoes of its producer members, and in their *right* as a producer is entitled to receive from the pool the payment of the uniform price for the milk (whether with or without a base-excess adjustment).

Whether a cooperative has a right to immediate access to a federal court, or must first seek relief by means of a

15A petition, does not turn on the abstract question of whether it is a handler.* It turns entirely on whether the issue the cooperative raises relates to its obligations to pay class prices as a handler—in which case it must petition the Secretary under Section 15A—or relates to its rights as a producer representative to receive full payment of the uniform price from the pool—in which case the 15A remedy is not available and the cooperative must resort directly to the courts for relief.

* Dairylea was not a handler (and thus has clear standing to sue as a producer representative) with respect to the Salem bulk tank milk. That milk was delivered directly to the plant of a handler in Flemington, N.J. (Johanna Farms) without passing intermediately through another plant. Johanna Farms had been buying such direct delivery milk from Dairylea for years and had always filed reports as the handler, which reports were always accepted by the Market Administrator up to the time of the trial (JA 226, 233-34; Dairylea's Exh. 10, JA 326). The Market Administrator's position is based upon a hypertechnicality as to the filing of a notice. In fact a sufficient notice was filed and accepted. (Dairylea's Exh. 18, JA 342-43). In any event the alleged failure to file was at most a mere irregularity and could be corrected *nunc pro tunc;* and in fact Dairylea and Johanna Farms did correct it by notice filed with the Market Administrator under date of January 29, 1973. See *Kean* v. *Commissioner of Internal Revenue,* 469 F.2d 1183, 1189 (C.A. 9, 1972); *Pearce* v. *United States,* 226 F.Supp. 702 (W.D.N.Y. 1964). The Government is also estopped to raise the issue because it was aware of the alleged technical failure and chose not to call the matter to the attention of Dairylea until the trial on January 23, 1973. Had the Department raised the issue promptly, Dairylea could have filed whatever additional notice was required prospectively for December 1972 and subsequent months and obviated any question as to standing. Instead the Department chose to lie low and to continue to accept the reports as filed by Johanna. Concededly the alleged failure to file does not affect anyone's financial obligations (JA 234) and the point was raised at the eleventh hour by the Government simply as a litigating ploy (JA 234-36). Under modern law this raises an estoppel against the Government (Davis, *Administrative Law Treatise,* 1970 Supplement at page 607).

In re Producers Creamery Company of Springfield, 23 A.D. 515 (1964)* involved a 15A proceeding brought by a cooperative association of producers which was also a handler under the milk marketing order. The Judicial Officer denied the availability of the 15A remedy because the matter essentially concerned the amount of payments which producers should receive from the pool and not the cooperative's obligations as a handler. The Judicial Officer said at p. 516:

> "Also, this is a forum limited by statute to handlers, as distinguished from producers or others. [Citations omitted] While petitioner is a handler * * * its complaint herein * * * is, in reality, on behalf of its producer members for the establishment of a higher Class I price under the order. In other words, petitioner's complaint is in its capacity as an agent of producers of milk and not as a handler thereof. [Citations omitted] What petitioner's members [producers] cannot do directly in an 8c(15)(A) proceeding they may not here do indirectly."

In re Barron Coop. Creamery, 10 A.D. 305 (1951), certain of the petitioner handlers were cooperatives operating plants. They filed a 15A petition *as handlers* challenging a provision of a milk market order to the extent that it provided for the reduction of payments from the pool to more distant producers. In dismissing their petition, the Judicial Officer said at p. 316:

> "Handlers have no justiciable interest in price differentials to producers based upon producers' loca-

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* The decisions of the Department in 15A proceedings are made by an administrative judge—referred to as the Judicial Officer—and are reported in a series of publications published by the Department as "Agriculture Decisions"—abbreviated for citation as A.D.

tions * * * because these do not affect the net cost of milk to handlers but are adjustments affecting only the distribution among producers out of the equalization pool. [Citing case] Since only handlers can be petitioning parties under 8c(15)(A) of the act and since handlers have no justiciable interest in price differentials to producers such as those involved, the petitions should be dismissed * * *. The three cooperative associations of producers are not eligible as *producers* to prosecute an 8c(15)(A) petition since, as stated, the 8c(15)(A) proceeding is limited to complaints of *handlers* as to orders, provisions thereof or obligations imposed thereunder." [Emphasis in the original.]

To the same effect—*In re Maquoketa Valley Cooperative Creamery,* 27 A.D. 179, 187 (1968); *In re Griffin & Brand of McAllen, Inc.,* 24 A.D. 415, 425 (1965); *In re Kewaskum Dairy Company,* 12 A.D. 1 (1953); *In re Alta Vista Creamery Company,* 11 A.D. 839 (1952); *In re Fitchett Brothers,* 17 A.D. 519 (1958); *In re Copiah Guernsey Dairy Cooperative, Inc.,* 16 A.D. 1193 (1957).

These decisions of the Judicial Officer follow the well-established doctrine in the Supreme Court that a handler is "without standing 'to object to the operation of the producer settlement fund'". *Zuber* v. *Allen,* 396 U.S. 168 at p. 192 quoting with approval *Stark* v. *Wickard,* 321 U.S. 288, 308 (1944).

However as to the standing of *producers* to sue, the Supreme Court held in *Stark* v. *Wickard,* 321 U.S. 288 and in *Zuber* v. *Allen,* 396 U.S. 168, that producers had the standing to bring a direct court action to challenge a marketing order provision which affected the amount they were to receive from the pool. The Government's attempt at page 22 to distinguish *Stark* is obviously without merit on its face; and the Government makes no attempt at all

to distinguish the *Zuber* case which, like *Stark,* holds that producers have standing to sue directly in court. These decisions clearly control the case at bar—for here the plaintiff asserts its rights as a cooperative association to receive from the pool in the right of its producer members the proper uniform base and excess prices payable to them. The very provisions of the law and marketing order, which in *Stark* were held by the Supreme Court to give producers the right to sue, give in express terms the same right to "associations of producers." The section of the statute which gives the right to producers to sue is Section 608c (5)(B)(ii) (see *Zuber* at p. 176n.) This section provides in one and the same phrase "for the payment to all producers and *associations of producers* delivering milk to all handlers of uniform prices for all milk so delivered." *

B. The only response by the Government to the foregoing is that the administrative decisions to which we have referred are distinguishable in "time" (Govt. Br. p. 21). The Government contends that this long and unbroken line of *published* decisions, including presumably the decisions of the Supreme Court of the United States to which we have referred, has been changed by *heretofore unannounced and unpublished* action by the Secretary's *staff*. It takes the position that the Department now permits cooperatives to litigate producer issues in 15A proceedings.

For this the Government relies (p. 21) on an *unreported* recommended decision *In re Lehigh Valley* by one of the Department's hearing examiners—a tentative decision by an official who has no authority under the Secretary's rules to make a final decision. That case essentially involved a

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* Quite apart from the foregoing, it is well established that an association has standing to sue for redress to which its members are entitled. *Sierra Club* v. *Morton,* 405 U.S. 727, 739 (1972); *National Motor Freight Traffic Association* v. *United States,* 372 U.S. 246 (1963).

handler obligation, a refusal by a handler to pay into the pool the full class price on its Class I milk.

Aside from the fact that the question of standing was not raised or even considered in the unpublished decision, the further fact is that the decision never became final because the petition, as reported in the only published reference to the case, 31 A.D. 2 (1972), was withdrawn.

The Government's discussion (at pp. 22-23) of *Rasmussen* v. *Hardin*, 461 F.2d 595 (C.A. 9, 1972) is misleading. There the action was instituted by a producer-handler, not by a cooperative. The issue was whether an amendment to a milk marketing order which brought under regulation a producer handler previously exempt, and thus required him to pay full class prices into the pool for his milk—clearly a handler obligation—was valid. The case in no way involved his rights as a producer.

The Government's discussion in the footnote on page 22 of *Inter-State Milk Producers' Cooperative, Inc.* v. *St. Clair*, 314 F.Supp. 108 (D. Md. 1970) (relied upon by the court below) is equally misleading. In that note the Government implies that the issue of whether producers might assert their rights *before a court* has not yet been presented to the courts. Plainly, that issue has been before the Supreme Court, which long ago vouchsafed to producers the right to sue directly in federal courts.* *Stark* v. *Wickard, supra*, and *Zuber* v. *Allen, supra*.

* The same footnote also states that the court in *Inter-State* dismissed for failure to exhaust. This is simply untrue; in that case the court had before it a request for a preliminary injunction, made by a cooperative in its capacity as a handler, to enjoin the Market Administrator from reclassifying into Class I certain milk handled by the cooperative and reported by it at the lower Class II price—clearly a handler issue pending the decision by the Secretary of a 15A proceeding which it had commenced. The court did not dismiss the request for injunctive relief on exhaustion grounds. Rather, it held that it had jurisdiction to grant interim relief, but denied an injunction on the ground that no irreparable harm had been shown.

C. The Government's final claim on the exhaustion issue is that the Secretary has changed his established position and is now willing to waive these "procedural objections" (see Govt. Br. p. 19). The supposed change of position is contained in a letter dated January 15, 1973* written on the letterhead of the General Counsel of the Department and signed by Victor W. Palmer, identified as an Attorney, Marketing Division. It is addressed to the Assistant United States Attorney in this case, and states that the writer is "authorized to assure" plaintiff's counsel and the Court that "we shall not raise such defenses," i.e., the issues as to Dairylea's standing to maintain a 15A proceeding.

The Department had every opportunity *prior* to the institution of this litigation to advise Dairylea of this alleged change of position. It is a matter of public record** and, therefore, the Court may take judicial notice of the fact that before instituting this litigation counsel for Dairylea advised the Secretary that Dairylea intended to institute suit with respect to this matter. At no time prior to the institution of suit did the Secretary advise Dairylea of his alleged change of position.

Moreover, the letter of January 15, 1973 could not confer jurisdiction under 15A. That procedure is statutory and the Supreme Court has made it clear that handlers may not by a 15A proceeding or otherwise challenge the operations of the producer settlement fund. Even the Secretary himself could not enlarge his statutory jurisdiction.

D. The Administrative Procedure Act forecloses the Government's effort to burden plaintiff with this sudden

* The action was commenced on November 1, 1972.

** A copy of our letter dated October 12, 1972 (confirming our telegram sent that day) to the Secretary is an exhibit on file in the District Court with an affidavit in support of an order to show cause by which this litigation was begun.

and unannounced change of position, since it was not published as required by that Act.

Section 3(a) of the Administrative Procedure Act, 5 U.S.C. §552(a) provides:

"(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

* * * * *

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure * * * ;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. * * *"

Here the failure to publish in the Federal Register (or indeed anywhere) what is plainly a dramatic change in the Secretary's established procedures makes the change void and unenforceable against Dairylea. *W. G. Cosby Transfer & Storage Corp.* v. *Froehlke*, 480 F.2d 498 (C.A. 4, 1973); *Piercy* v. *Tarr*, 343 F.Supp. 1120 (N.D. Calif. 1972).

E. In any event a 15A proceeding would be futile. What would happen before the Secretary is a foregone conclusion on the basis of the views he has fully expressed in his briefs in this case. The Government's defense of the challenged provisions of the order must rest solely on the record in the administrative proceeding on the basis of which they were promulgated. (See our main brief page 36.) The only conceivable result of requiring a 15A proceeding would be that some two or three years from today, the parties would be back in this Court. All that would have been accomplished would be the imposition of additional useless delay and expense on both parties.

Under these circumstances even if Dairylea were a handler as to the issues involved in this case (which we strenuously deny), this Court has basic equitable jurisdiction to hear the case. A plaintiff is not required to pursue a plainly futile administrative remedy. 3 Davis, *Administrative Law Treatise*, p. 97; *City Bank Farmers Trust Co.* v. *Schnader*, 291 U.S. 24, 34 (1934); *Gully* v. *Interstate Natural Gas Co.*, 82 F.2d 145 (C.A. 5, 1936); *Walker* v. *Southern Railway Co.*, 385 U.S. 196 (1966); *United States* v. *Sunny Hill Farms Dairy Co.*, 258 F.Supp. 94 (E.D. Mo. 1966).

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the District Court appealed from should be reversed and the relief sought by Dairylea granted.

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